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The terms "project" and "plan" in the Natura 2000 appropriate assessment

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Abstract

The Natura 2000 appropriate assessment for impacting projects or plans under Article 6(3) HD is the central statutory instrument for the protection of Sites of Community Importance (SCI) and the Special Protection Areas (SPA). The decisive factor in whether or not an appropriate assessment is required depends on the question of whether a project or plan is present within the meaning of Article 6(3) of the Habitats Directive 92/43/EEC[1] (HD). The Habitats Directive does not define these terms in any more detail, which is why they must be specified more closely through interpretation. This paper will present the definitions given by the European Court of Justice (ECJ)[2] case law and national courts like the German Federal Administrative Court (BVerwG)[3] and discuss the consequences and practical scope of the terms. The focus of the following investigation will be on the term "project". This is because for "plans", the envisaged projects are essentially also decisive, given that only these can have significant adverse effects on the conservation objectives. There are a variety of questions regarding when a human activity constitutes a project and under which conditions Member States could exempt activities from the requirement for an assessment. This article will start with an outline of the temporal scope of the appropriate assessment and,

1 Council Directive 92/43/EEC of 21.5.1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

2 All ECJ decisions can be located based on their file number and can be freely accessed under: curia.europa.eu/juris/recherche.jsf?language=en.

3 From 2002 onwards, BVerwG decisions can be located based on their file number and can be freely accessed under: http://www.bverwg.de/entscheidungen/entscheidungen.php. References to the locations of earlier decisions are provided in this article.

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following this, briefly explore the scope of plans or projects directly connected with or necessary to the management of the site, as they are not the subject of an assessment.

Keywords
European Union (EU), Natura 2000, appropriate assessment, impact assessment, Article 6(3) Habitats Directive, legal term definitions, project, plan, agriculture, forestry, recurrent measures, case law, ECJ, Germany, BVerwG

1. Introduction

The habitats and species that are to be protected by Natura 2000 are the common heritage of the European Community, which is why the Birds Directive and the Habitats Directive envisage specially targeted and enhanced conservation provisions and measures.[4] The central statutory instrument for the protection of the Natura 2000 sites is the appropriate assessment for impacting projects or plans pursuant to Article 6(3) HD. The appropriate assessment must take place prior to the authorisation and implementation of a project or plan (*ex ante*).[5] The assessment procedure contains two main steps:[6]

The first step is the compulsory examination of whether an appropriate assessment is actually required for a project or a plan in the sense of Article 6(3) HD and does not serve the immediate purpose of management of the site. A screening process must involve the examination of whether significant adverse impacts on a Natura 2000 site are to be expected. If this is the case, the authorities must assess the compatibility of the project or plan in a second step. Compatibility can only be ascertained if it concerns in relation to significant adverse impacts on the site can be ruled out without any reasonable scientific doubts remaining. If this cannot be demonstrated, then the national authorities shall not approve the plan or project. They can only permit the proposed development through a derogating approval[7] pursuant to Article 6(4) HD.

The decisive factor in whether or not an appropriate assessment is required based on European Law is thus dependent on the question of whether a project or plan exists within the meaning of Article 6(3) HD. The Habitats Directive does not define these terms in any more detail, which is why they must be specified more closely through interpretation. Numerous ECJ decisions and opinions from the literature and national courts are now available on this topic.

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4 ECJ, adjudication of 23.5.1990 – C-169/89, margin number 11; adjudication of 11.7.1996 – C-44/95, margin number 23, 26; adjudication of 28.6.2007 – C-235/04, margin number 23; adjudication of 13.7.2006 – C-191/05, margin number 9; adjudication of 25.10.2007 – C-334/04, margin number 24.

5 ECJ, adjudication of 14.1.2010 – C-226/08, margin number 48 *et seq.*; adjudication of 24.11.2011 – C-404/09, margin number 125, 174.

6 *Möckel* Nature Conservation 2017b.

7 elaborated on in *Möckel* Nature Conservation 2017a.

In the following, the debate will only briefly enter into the term "plan" (see 5). This is because the proposed developments that are envisaged in the plan are decisive here, given that only these projects can have significant adverse effects on the conservation objectives. The focus of the investigation is thus on the term "project" in paragraph 6. In relation to this, there are a variety of questions regarding differentiation from other human actions and the ECJ has repeatedly needed to counteract national attempts to use and apply restrictive definitions of the term "project". Most of the questions discussed in paragraph 6 for projects also apply to plans.[8] Prior to entering into the two terms, the main causes of the frequent unfavourable conservation statuses (see 2) and the temporal scope of the appropriate assessment will be briefly outlined (see 3), because both are relevant for the definitions of the terms.

2. Causes of unfavourable conservation statuses

The aim of the Habitats Directive and the Birds Directive is to maintain or restore a favourable conservation status for the specifically protected habitats and species within the biogeographical region (Article 2(2) HD, Articles 2 and 3(1) Birds Directive). In the second reporting period from 2007 to 2012, a favourable status had only been achieved for 16 percent of habitat types and 23 percent of species by 2012.[9] In spite of the additional obligations for protection and improvement laid down in the Water Framework Directive, the proportion of species with an unfavourable conservation status is highest in inland waters.[10] In relation to habitat types, dunes, grassland, wetlands and marshland, forests and coastal waters exhibit the highest level of unfavourable conditions.[11]

One of the main reasons is that the great majority of Natura 2000 sites are not wild areas, but are frequently sites in historical landscapes or in the cultural landscapes of the present, such that there are a variety of conflicts in relation to land use, changes in land use and social development.[12] Anthropogenic uses within or adjacent to the sites are the norm. The main uses in Natura 2000 sites are agriculture, forestry and fisheries. Agricultural land use practices (e.g. ploughing up of grassland, use of fertilisers and plant protection products) and anthropogenic changes to natural conditions (e.g. drainage measures, removal of landscape elements) have caused the greatest pressures and threats to the specially protected habitats and species in terrestrial ecosystems, including inland waters.[13] Fishing and harvesting of shellfish, as well as pollution, are

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8 *cf. Therivel* Environmental Impact Assessment Review 2009, 261 *et sqq*.

9 European Commission 2015.

10 European Commission 2015, p. 8.

11 European Commission 2015, p. 15.

12 EEA 2015, p. 135 *et sqq*.

13 EEA 2015, p. 6 *et sqq*., 70 *et sqq*., 96 *et sqq*., 151 *et sqq*.; European Commission 2015, p. 12.

among the most common causes in marine systems.[14] Apart from this, Natura 2000 sites are also used for tourism, local recreation and water management. Since 2010, the European Commission has issued guidelines for Natura 2000 on the handling of different competing anthropogenic uses.[15]

The fact that conditions have hardly improved since the first reporting period can be explained, on the one hand, by the substantial deficiencies in the implementation of protection by Member States but also, on the other hand, by inadequate prioritisation.[16] For example, in spite of the disproportionately high importance of agriculture and forestry, comparatively few measures have been implemented in relation to this within and outside the boundaries of Natura 2000 sites and the focus has been on the designation of protected areas and the issuing of statutory conservation provisions.[17] In this process, the European Commission sees a requirement for an ecologisation of competing land uses: "if we want to conserve Europe´s natural capital, then agriculture, energy and transport policies must be sustainable too"[18]. However, the Commission only partially prevailed in 2013 with its proposals for a greener Common Agricultural Policy. Scientists attest that the new greening requirements for direct agricultural payments,[19] which apply from 2015 to 2020, only harbour minimal potential for improvements to nature and the environment in Europe and Germany.[20]

3. Temporal scope of the appropriate assessment

The requirement for an appropriate assessment of new plans and projects applies for all Sites of Community importance (SCIs) when these sites have been included in one of the European Commission biogeographical lists of sites pursuant to Article 4(2) subsection 3 HD.[21] Protection at the national level, which is enforced by Article 4(4) HD, is not required for applicability. In addition, the appropriate assessment replaces the examination pursuant to Article 4(4) BD, if a Special Protection Area (SPA) is

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14 European Commission 2015, p. 13; EEA 2015, p. 101 *et sqq*.

15 accessable on http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm.

16 *cf.* Milieu, IEEP and ICF 2016; *Vassiliki et al.* CoBi 2015, 260 (266 *et sqq.*).

17 EEA 2015, p. 132 *et sqq*.

18 http://ec.europa.eu/environment/nature/index_en.htm (accessed on 27.11.2015).

19 Articles 43-47 and Annex X of Regulation (EU) no. 1307/2013 with provisions on direct payments to proprietors of farms within the scope of the Common Agricultural Policy funding regulations, ABl. EU no. 347 v. 20.12.2013, p. 608 *et sqq*.

20 *cf. Underwood/Tucker* 2016; *Pe'er et al.* Conservation Letters 2016, 1 *et sqq*.; *Pe'er et al.* Science 2014, 1090 *et sqq*.

21 ECJ, adjudication of 13.1.2005 – C-117/03, margin number 25; adjudication of 11.9.2012 – C-43/10 margin number and headnote 6.

legally designated in accordance with Article 7 HD.[22] This is beneficial for projects and plans.[23] Article 6(3) and (4) HD do not apply in the case of potential SCIs and non-designated SPAs, but Member States are required to take protective measures for potential SCIs and must fulfill their duties in line with Article 4(4) BD.[24]

Therefore, in general, projects and plans authorised prior to the listing of SCIs or prior to the legal designation of SPAs do not need a subsequent appropriate assessment, even if they were realised afterwards.[25] However, after the listing of SCIs or the designation of SPAs, the realisation and operation of these authorised projects or plans are subject to Article 6(2) HD, which prohibits changes and disturbance in the Natura 2000 sites.[26] According to the ECJ, Article 6(2) and (3) HD provide a similar level of protection.[27]

In relation to SCIs, the German BVerwG asked the ECJ whether a subsequent appropriate assessment comparable to that in Article 6(3) HD is still to be carried out and – if yes – what standards are to be set and whether the reasons for derogation given in Article 6(4) HD are applicable.[28] The ECJ has answered these questions fully within the meaning of a comprehensive protection of integrity for Natura 2000 sites.[29] In cases where a subsequent review of the implications for the site constitutes the only appropriate step for avoiding the implementation of the plan or project referred to, resulting in deterioration or disturbance that could be significant in view of the objectives of that directive, a subsequent appropriate assessment equivalent to Article 6(3) HD must also be carried out within the scope of Article 6(2) HD.[30] However, the ECJ also stipulates that Member States have the option, by analogy with the derogation procedure provided for in Article 6(4) HD, of invoking reasons of overriding public interest and, if the conditions laid down by that provision are essentially satisfied, of authorising a plan or project which could otherwise have been

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22 ECJ, adjudication of 24.11.2011 – C-404/09, margin number 97; adjudication of 13.12.2007 – C-418/04, margin number 173.

23 more detailed in *Möckel* JEEPL 2014, 392 (402 *et sqq.*, 405 *et sqq.*); *Ureta* JEEPL 2007, 84 (86).

24 for SCI: ECJ, adjudication of 13.1.2005 – C-117/03, margin number 22 *et sqq.*; adjudication of 15.3.2012 – C-340/10, margin number 43–47; for SPA: ECJ, adjudication of 18.10.1989 – C-374/87, margin number 50–56; adjudication of 13.12.2007 – C-418/04, margin number 173; adjudication of 24.11.2011 – C-404/09, margin number 97.

25 *cf.* only ECJ, adjudication of 14.1.2016 – C-399/14 – Grüne Liga Sachsen, margin number 33.

26 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 33; adjudication of 24.11.2011 – C-404/09, margin number 124 *et seq.*; adjudication of 14.1.2010 C-226/08, margin number 49; BVerwG, decision of 6.3.2014 – 9 C 6.12, margin number 22, 26 *et sqq.*

27 settled ECJ case law, adjudication of 14.1.2016 – C-399/14, margin number 52; adjudication of 15.5.2014 – C-521/12, margin number 19.

28 BVerwG, decision of 6.3.2014 – 9 C 6.12.

29 for n by *McGillivray* JEEPL 2011, 329 (352) and *Schoukens* JEEPL 2014, 1 (26 *et sqq.*).

30 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 42–54.

regarded as prohibited by Article 6(2) HD.[31] In these cases, a subsequent review that meets the requirements of Article 6(3) HD is always necessary,[32] as a full appropriate assessment is a compulsory condition for a derogation decision under Article 6(4) HD according to settled ECJ case law.[33] However, the possibility of a subsequent derogation analogue to Article 6(4) HD does not exist for projects and plans in belatedly designated SPAs, because Member States are not permitted to gain any advantages from the violation of their obligations in relation to designations under Article 4(1) and (2) BD.[34] In belatedly designated SPAs, derogations are only possible within the scope of Article 4(4) BD, which is significantly more restrictive due to the settled case law of the ECJ.[35]

In the subsequent review, standards must neither be changed for the appropriate assessment, nor for the derogation procedure, even in the case of proposed developments that have already been realised. Instead, a full assessment is to be carried out on the proposed development, considering all circumstances that have occurred up to the date of inclusion and also all implications arising or likely to arise following the partial or total implementation of the plan or project on the site in question after that date.[36] For SCIs, the same applies to the derogating procedure, which must take into account overriding public interests and potential alternatives based on the current situation.[37] In the event that the assessment cannot rule out incompatibility with certainty and the conditions for a derogation equivalent to Article 6(4) HD or to Article 4(4) BD are also absent, approved proposed developments are to be stopped due to inadmissibility, installations with an adverse impact are to be demolished and the approval issued by the authorities is to be revoked. This legal consequence is not disproportionate in relation to the protection of Natura 2000 sites as the common heritage of the European Community and there is also no assurance for projects and plans that the law will remain unchanged.[38] The ECJ made clear, that National procedural law and

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31 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 55 and 67 (with reference to adjudication of 24.11.2011 – C-404/09, margin number 156).

32 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 56 *et seq.*; adjudication of 10.11.2016 – C-504/14, margin number 41.

33 settled ECJ case law, adjudication of 15.5.2014 – C-521/12, margin number 36; adjudication of 11.4.2014 – C-258/11, margin number 35; adjudication of 16.2.2012 – C-182/10, margin number 74 *et seq.*

34 ECJ, adjudication of 18.10.1989 – C-374/87, margin number 50–56. Following BVerwG, adjudication of 18.7.2013 – 4 CN 3.12, margin number 28 *et sqq.*

35 ECJ, adjudication of 18.12.2007 – C-186/06, margin number 37; adjudication of 11.7.1996 – C-44/95, margin numbers 26 *et seq.*, 42; adjudication of 2.8.1993 – C-355/90, margin numbers 18 *et seq.*, 45; adjudication of 28.2.1991 – C-57/89, margin number 22 *et sqq.*

36 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 54, 58–62, 67 *et sqq.* and headnote 2–3.

37 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 67 *et sqq.* and headnote 3.

38 *cf.* ECJ, adjudication of 14.1.2010 C-226/08, margin number 46; adjudication of 10.11.2016 – C-504/14, margin number 41; ECJ case law, adjudication of 14.1.2016 – C-399/14, margin numbers 68-71.

the protection of trust in this law do not exclude the application of new regulations on future impacts.[39]

Last but not least, if national law already requires a renewed authorisation assessment for an existing project or plan because, for example, significant changes are to be made or the earlier approval was issued for a limited period, then Article 6(3) and (4) HD are applicable as the renewed decision for authorisation is now carried out based on listing of the site.[40] This also applies to replacement constructions and for recurrent measures.[41]

4. Projects and plans directly connected with or necessary to the management of the site

In its form as a derogating provision, the scope for proposed management developments is to be narrowly defined and is only applicable if developments are intended to promote the relevant conservation objectives in the site within the meaning of Article 6(1) HD.[42] The reason for the derogation is that significant adverse impacts can normally be excluded in these cases. The measure must be implemented or commissioned by the body managing the site. In contrast, other measures that pursue different aims within the site (e.g. walking or cycling routes to promote tourism or for agriculture, forestry and fishery) are not covered by this exemption as significant adverse impacts on the conservation objectives cannot generally be ruled out.[43] The ECJ says, "it is not sufficient merely to describe such a project as a Natura-2000 measure or to make a contract with the area management."[44] However, pursuant to the European Commission, an appropriate assessment is dispensable if such measures have been organised with a view to their compatibility within the scope of an integrated management plan.

5. Plans

The ECJ has still not defined the term "plans" in Article 6(3) HD. The Court has certainly not disapproved the opinion of the Advocate General *Fennelly* in the case C-256/98, that the term "plan" must be interpreted extensively.[45] The Court has not yet clarified whether recourse can and should be taken to the definition of the term in

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39 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 68 *et seq.*

40 *cf.* ECJ, adjudication of 14.1.2016 – C-399/14, margin number 76; adjudication of 14.1.2010 C-226/08, margin number 41-46; adjudication of 7.9.2004 – C-127/02, margin number 28 *et seq.*

41 *Möckel* Nature Conservation 2017b.

42 ECJ, adjudication of 4.3.2010 – C-241/08, margin number 50–56.

43 *Epiney*, in: Epiney/Gammenthaler 2009, p. 93 *et seq.*

44 Case C-241/08 Commission v France [2010] ecr I-1697, paras. 44–56.

45 ECJ, adjudication of 6.4.2000 – C-256/98, margin number 38; AG *Fennelly*, opinion delivered on 16.9.1999 – C-256/98, ECLI:EU:C:1999:427, paragraph 33.

the European Directive 2001/42/EEC on the Strategic Environmental Assessment[46] (SEA Directive). Even the terminological differentiation between project and plan is still not clearly visible in ECJ case law on appropriate assessments as the ECJ itself refers to "plan or project" in its decisions, even if this is only (initially) the case of a plan.[47] What appears to be crucial to the ECJ is the proposed development that is being pursued with a plan, which is why it uses both terms together. In effect, a plan can only have a significant adverse effect on a Natura 2000 site if the proposed developments in the plan could have significant impacts on the conservation objectives.

Controversial discussions are taking place on whether the definition of "plans" in Article 2 a) of the SEA Directive can and should be employed.[48] The SEA Directive covers plans that are devised or accepted by national, regional or local authorities (including statutory master plans) and must be compiled due to statutory or administrative provisions. The ECJ has clarified for this process that the stipulation "which are required by legislative, regulatory or administrative provisions" does not need to be subject to such a strict interpretation that an absolute statutory obligation exists on the issuing of a plan or programme, as the objectives and practical efficacy of the SEA Directive would otherwise be palpably restricted.[49]

It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down.[50]

A condition for the adoption of a plan that is subject to an assessment is thus simply that legislative or administrative provisions provide for such plans and cover them in more detail. In order to differentiate between "plans and programmes" under the SEA-Directive and "projects", which are governed by the European Directive 2011/92/EU on the Environmental Impact Assessment[51] (EIA Directive), the ECJ has elaborated that a plan or programme constitute a measure, which defines criteria and

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46 Directive on the assessment of the effects of certain plans and programmes on the environment, adopted by the European Parliament and Council on 27.6.2001, OJEU no. L 197 of 21.7.2001, p. 30 *et sqq.*

47 *cf.* e.g. ECJ, adjudication of 21.7.2016 – C-387/15 and C-388/15, margin number 2, 42 *et sqq.*; adjudication of 11.9.2012 – C-43/01, margin number 92 *et sqq.*, 106 *et sqq.*, 118 *et sqq.*

48 *cf. Sobotta* Journal for Nature Conservation 2017, in press (240)*; Epiney*, in: *Epiney/Gammenthaler* 2009, p. 97 *et seq.*

49 ECJ, adjudication of 22.2.2012 – 567/10, margin number 38-31. *cf. Sobotta* Journal for Nature Conservation 2017, in press (240 *et seq.*).

50 ECJ, adjudication of 22.2.2012 – 567/10, margin number 31.

51 Directive on Environmental Impact Assessment for specific public and private projects adopted by the European Parliament and Council on 13.12.2011, OJEU no. L 26 of 28.1.2012, p. 1 *et sqq.* Superseded Directive 85/337/EEC.

detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny.[52]

Similar requirements should be also assumed for Article 6(3) HD, as only governmental plans with externally binding or official internal legal effects can predetermine an adverse impact on a Natura 2000 site by a proposed development in a legally relevant manner.[53] Whether or not the plan is spatially located inside or outside a Natura 2000 site does not matter, as is the case for projects.[54] The ECJ has made clear that plans and projects devised by legislative bodies are also subject to the obligations given in Article 6(3) HD.[55] The whole plan, not only parts thereof, is subject to the appropriate assessment and must be prohibited in the case of incompatibility.[56]

Conversely, private plans are irrelevant, so long as they do not lead to an application for authorisation of a specific proposed development or are to be realised in proposed developments that are not subject to approval. In both cases, however, a project is then present within the meaning of Article 6(3) HD.

6. Projects

6.1. Terminological definition

Even though the Habitats Directive does not specify the term "project" any more closely, a European definition for the term is to be assumed. The ECJ refers to the term "project" in Article 1(2) a) of the EIA Directive for its interpretation of the term and takes a broad view on what projects are. In accordance with Article 1(2) a) of the EIA Directive for the ECJ, the term "project" in Article 6(3) HD includes not only building installations, but also all human interventions in nature and the landscape, independent of whether they are also subject to an authorisation procedure based on national law.[57] It is therefore not the kind of proposed development that is decisive, but simply the potential effects on Natura 2000 sites, which is why an appropriate assessment is also necessary for activities that are not intrinsically associated with physical

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52 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10, margin number 95; adjudication of 22.2.2012 – 567/10, margin number 30.

53 A broader interpretation uses Environment, Heritage and Local Government of Ireland 2009, p. 19.

54 *cf. Therivel* Environmental Impact Assessment Review 2009, 261 (Fig. 1 at p. 262).

55 ECJ, adjudication of 16.2.2012 – C-182/10, margin number 69.

56 the debate on this question in the UK in *Therivel* Environmental Impact Assessment Review 2009, 261 (264).

57 settled ECJ case law, adjudication of 14.1.2010 – C-226/08, margin number 38; adjudication of 7.9.2004 – C-127/02 – Waddenvereniging and Vogelbeschermingsvereniging, margin number 24 *et sqq.*; adjudication of 10.1.2006 – C-98/03, margin number 40 *et seq.*

change.[58] This means that every human measure could be a project, if it might have negative potential effects on the integrity of a Natura 2000 site. Furthermore, it is irrelevant whether the project proponent is a private person or public authority, including the legislator. The ECJ also states in settled case law that an appropriate assessment is to be carried out if there is the likelihood or threat that a project, either alone or in combination with other projects and plans, will have a significant adverse impact on the integrity of the site concerned.[59] No appropriate assessment is required if this can clearly be ruled out, i.e. without reasonable doubt, by a screening process.[60] The screening of a potential threat is to be based on objective circumstances and under consideration of the specific characteristics and environmental conditions of the Natura 2000 site in question. It is only in this appraisal of the potential significant adverse effects that the type, size and location of a project must be considered. However, if the project definition of the ECJ – referring to the term "project" in the EIA Directive – depends on the potential negative effects, then the term "project" includes the screening of the potential impacts.[61] There is only a project in the sense of Articles 6(3) HD, requiring an appropriate assessment, if significant effects could not be ruled out in the screening process. The screening is therefore not an expendable process step,[62] not mentioned in Article 6(3) HD,[63] but is part of the project definition.

A variety of consequences and further questions arise from the impact-related understanding of the term "project".[64]

6.1.1. Proposed developments within and outside Natura 2000 sites

The protective system stipulated in Article 6(3) HD is basically limited to the protected site within its designated boundaries. Proposed developments outside a Natura 2000 site may, however, have external effects on the conservation objectives of the site – for example, because they emit compounds (e.g. nutrients) or other emissions,

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58 *cf.* ECJ, adjudication of 10.1.2006 – C-98/03, margin number 40 *et seq.*; European Commission 2000, p. 32; BVerwG case law, adjudication of 12.11.2014 – 4 C 34.13, margin number 29; adjudication of 19.12.2013 – 4 C 14.12, margin number 28.

59 ECJ, adjudication of 7.9.2004 – C-127/02, margin number 43 *et seq.*; adjudication of 26.5.2011 – C-538/09, margin number 39; adjudication of 21.7.2011 – C-2/10, margin number 41 *et seq. cf. Ureta* JEEPL 2007, 84 (87 *et seq.*).

60 *cf.* ECJ, adjudication of 7.9.2004 – C-127/02, margin number 44, 49; adjudication of 26.5.2011 – C-538/09, margin number 39; European Commission 2001, p. 16.

61 more detailed on the screening step, *Möckel* Nature Conservation 2017b; European Commission 2001, p. 16 *et sqq.* and *Peterson/Kose/Uustal* Journal of Environmental Assessment Policy and Management 2010, 185 (190 *et sqq.*).

62 however, *Lees* JEL 2016, 191 (203 *et seq.*).

63 established by European Commission 2001, p. 16 *et sqq.*

64 for the Court decisions and debate in the UK, *Tromans* 2012, chap. 5.

including noise (e.g. traffic or aircraft noise), into the site.[65] A proposed development may also exert an external influence on the water balance within the site, for example, through the diversion of rivers, a reduction in their water levels, or changes in the groundwater levels in the site due to drainage measures.[66] Such proposed developments are, at minimum, to be subjected to a screening process and to be fully assessed for their compatibility if a significant adverse impact cannot be excluded.[67] Finally, an appropriate assessment may also be necessary if a proposed development would affect the reproduction or reduce the number of individuals of those species in the relevant protected areas (e.g. in the case of migratory species) or prevent gene flow between the protected animals inhabiting the site and relevant neighbouring populations outside it or prevent access to important food sources, areas where reproduction takes place or resting sites.[68] Projects are therefore not restricted to proposed developments within Natura 2000 sites.

General specifications for relevant projects based on the size of the radius around the Natura 2000 site are not expedient, because the significant of impacts of projects are rather more dependent on the habitat types and species that are protected, the kind of project and impact, on the attribution of effects over distance and on the impacts of cumulating projects and plans.[69]

6.1.2. Imputation of indirect impacts

The broad scope of an impact-related project term raises the question of when an appropriate assessment for a proposed development is necessary due to indirect impacts. In this process, indirect impacts are to be understood as impacts that are directly and causally linked to the proposed development, but are only associated with the development through additional causal links in a chain. Relevant indirect or collateral effects are present, for example, if non-protected animal and plant species that are a basic food source of a protected species in the site (e.g. insects for birds) are adversely affected by a proposed development or if a river is polluted by the proposed development and

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65 ECJ, adjudication of 24.11.2011 – C-404/09, margin number 146 *et sqq.*, 166 *et sqq.*; adjudication of 20.10.2005 – C-6/04, margin number 34; BVerwG, adjudication of 18.12.2014 – 4 C 35.13, margin number 34, 43 *et seq.*; adjudication of 28.3.2013 – 9 A 22.11, margin number 84, 88 *et seq.*

66 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10; adjudication of 13.12.2007 – C-418/04, margin number 256 *et seq.*

67 *cf.* ECJ, adjudication of 20.10.2005 – C-6/04, margin number 34; adjudication of 7.9.2004 – C-127/02, margin number 43 *et seq.*; European Commission 2000, p. 33.

68 ECJ, adjudication of 26.4.2017 – C-142/16, margin numbers 29 *et sqq.*; adjudication of 24.11.2011 – C-404/09, margin number 146 *et sqq.*, 166 *et sqq.*; BVerwG, adjudication of 14.4.2010 – 9 A 5.08, margin number 32–34; decision of 23.1.2015 – 7 VR 6.14, margin number 16; adjudication of 14.7.2011 – 9 A 12.10, margin number 93.

69 *cf. Therivel* Environmental Impact Assessment Review 2009, 261 (264); *Möckel* Nature Conservation 2017b.

the pollutants thus enter into a Natura 2000 site. Such indirect or collateral effects of a proposed development are also relevant to the assessment, insofar as they can be imputed.[70] No evidence for causality is required in the appropriate assessment and the probability of significant adverse effects due to the proposed development is therefore sufficient.[71]

However, an obligation to undergo an assessment, thus a project in the sense of Article 6(3) HD, can no longer be assumed if the expected effects of a proposed development cannot be unambiguously attributed to the development. For example, this is the case for the emission of greenhouse gases, as no concrete association can be made between the proposed development and the effects of climate change on a specific site due to global processes and emissions. The same principally applies if the imputation is affected by the autonomous, independent actions of third parties (e.g. the construction of a biogas plant also results in an increase in maize crops within a Natura 2000 site). Conversely, when cumulative actions and impacts of third parties arise from the proposed development – as is frequently the case for plans – then this increase could be attributed to the development (e.g. when opening or expanding roads or building or expanding housing results in greater visitor traffic and increased negative effects on a Natura 2000 site[72]).

6.1.3. Planned impacts on Natura 2000 sites?

The BVerwG has raised the question on whether the impact-related term "project" requires greater specification and narrowing down in relation to the general prohibitions to change and disturbance in Article 6(2) HD, stating that a premise for projects within the meaning of Article 6(3) HD is that they must be planned developments.[73] The Court therefore only regards human activities that are not related to the construction or operation of a plant as a "project" (e.g. low-altitude flying by military aircraft, airways or non-binding landscape plans) if there is the option of assessing them for their compatibility with the conservation objectives of a Natura 2000 site, through existing drafts, concepts or a stipulated practice.[74] The consequence of this would be that measures that had to be carried out ad hoc, like agricultural measures (e.g. pesticide use, conversion of permanent grassland) would not constitute projects in the sense of

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70 *cf.* e.g. BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 11.

71 *cf.* ECJ, adjudication of 10.11.2016 – C-504/14, margin number 29; adjudication of 14.1.2016 – C-399/14, margin number 42; adjudication of 14.1.2016 – C-141/14, margin number 58; adjudication of 24.11.2011 – C-404/09, margin number 142.

72 *cf.* ECJ, adjudication of 10.11.2016 – C-504/14, margin number 53-60; *Therivel* Environmental Impact Assessment Review 2009, 261 (265 *et seq.*).

73 BVerwG, adjudication of 13.4.2013 – 4 C 3.12, margin number 30.

74 BVerwG, adjudication of 8.1.2014 – 9 A 4.13, headnote 6 and margin number 55. Confirmatory BVerwG, decision of 24.3.2015 – 4 BN 32.13, margin number 35.

Article 6(3) HD, which require an assessment of their compatibility. The Court hereby includes considerations on feasibility in the definition of the term "project".

To what extent this is compatible with Article 6(3) HD appears debatable, as activities that have not been planned comprehensively or are being constantly practised can also constitute interventions with significant adverse effects on Natura 2000 sites. Furthermore, the ECJ has specified strict requirements, also related to the protected goods, of a blanket release from the appropriate assessment for specific proposed developments (see 6.2). After all, a planned approach underlies every activity, which is why a more precise differentiation would be required here based on the quality of forward planning. The question on the option of an official appropriate assessment referred to by the Court is therefore of greater importance, as European Law is also not permitted to demand anything impossible or disproportionate of Member States in accordance with Article 5(4) of the Treaty on European Union (TEU). However, this does not result in a licence for exemption for specific activities. On the contrary, Member States are under the obligation to ensure that all relevant activities can be appropriately assessed by the authorities using suitable procedural provisions. For example, this can be implemented through an obligation to disclose specific activities prior to their conduct (see 6.1.4).

Actions that are exempt from the obligation for assessment are exclusively those that only have the properties of bagatelles and where significant adverse effects on the conservation objectives can be excluded (e.g. leisure activities like walking, cycling or riding on designated). This is because, in this case, only the accumulation of multiple individual actions (many visitors) could have significant adverse effects. Significant negative cumulative effects must be prevented by the authorities through measures pursuant to Article 6(1) and (2) HD (e.g. guiding or limiting visitors) and must also be considered within the scope of the appropriate assessment on the creation of infrastructures (e.g. paths in the site, roads to the site).

6.1.4. No restriction to proposed developments with an obligation for disclosure or authorisation

If the impact on Natura 2000 sites is decisive, then the requirement for an appropriate assessment does not depend on national rules of procedure, especially on an obligation for approval or disclosure.[75] The ECJ therefore consequently saw a contravention against Article 6(3) HD in the former German legal definition of the term "project", which had limited the term to proposed developments subject to authorisation.[76] It is also irrelevant whether a proposed development is planned by a national office, a com-

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75 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 68 *et seq.*; adjudication of 10.1.2006 – C-98/03, margin number 40 *et sqq.*

76 ECJ, adjudication of 10.1.2006 – C-98/03, margin number 42 *et sqq.*

pany or a citizen. Even projects and plans put forward by the legislator are not exempt from the protective system and are also to be assessed.[77]

Nevertheless, a specific obligation for disclosure or approval that is related to Natura 2000 is required for projects that do not otherwise require approval or disclosure, to ensure that the responsible authorities can assess the compatibility of all relevant projects. For this reason, after the judgement reached by the ECJ, a general obligation for disclosure was introduced in § 34(6) of the German Federal Nature Conservation Act (BNatSchG) for all projects that are otherwise not subject to an obligation for approval or disclosure. The German legislator did not, albeit, define in any greater detail when a human activity constitutes a project.

However, a general obligation for disclosure for "projects" without any further detail on the definition of the term "project" raises significant practical and essentially also legal problems, as the European understanding of the term "project" is then being referred to, based on which all projects are interventions that are likely to have a significant effect on the integrity of the site concerned (see 6.2). This means it is incumbent upon the citizen or company acting in the case concerned to assess whether their planned measure, either alone or in combination with other projects and plans, is likely to have significant adverse effects on the conservation objectives - i.e., these cannot be unambiguously excluded. This screening process that must be conducted ex officio is – as explained above – to be undertaken based on objective circumstances and under consideration of the specific characteristics and environmental conditions of the Natura 2000 site in question. There are significant doubts as to whether every private proponent of a measure (e.g. farmers or foresters, maintenance associations, private building contractors) are in the position, sufficiently competent and also willing to independently carry out such a specialist conservation screening process adequately and objectively or to commission it at their own cost.[78] The cumulative impacts of other projects and plans alone are difficult to determine and assess for private proponents of a measure, as they will usually have no legal or administrative access to the required information on the other proposed developments.

This means that, in the event of a general obligation for disclosure for "projects", there is no legal guarantee that all relevant proposed developments will be directed to undergo an official appropriate assessment. The comprehensible interest of the State in limiting the amount of official assessment work,[79] however, does not justify a lower conservation standard for projects that are not subject to an obligation for approval or disclosure. Therefore, all measures and proposed developments within or in the vicinity of Natura 2000 sites, for which adverse effects on the conservation objectives cannot be excluded based on general experience, are to be subject to a blanket obligation for disclosure. The measures and proposed developments, as well as the relevant spatial scope of validity for the obligation for disclosure should

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77 ECJ, adjudication of 16.2.2012 – C-182/10, margin number 69.

78 *cf. Sundseth/Roth* 2013, p. 52 *et seq.*, 92.

79 in line with the German Federal Governance (Bundestag-Drucksachen 16/5100, p. 10).

be specified in a legally binding manner in a list that is specific to the site or in a general list. In the event that a reduction in administrative work is desired, a general obligation for authorisation could be considered for land use practices (e.g. agriculture, forestry, fishery, and hunting) that have not been subject to approval to date, instead of making every single land use measure subject to disclosure and assessing it in cases of disclosure. This condition for approval should, whenever possible, be associated with a concentrated effect in relation to all obligations under public law and should only apply for a limited time period to ensure that land use is again assessed at regular intervals based on current practices, the legal position and the situation in the site concerned.

6.1.5. Classification of recurrent measures

In spite of longer time frames, there is only one project in the case of uninterrupted operation of facilities (e.g. a motorway). For measures that are not constant, but only recurrent at regular intervals (e.g. maintenance measures[80]; land use measures by agriculture, forestry or fisheries[81]), the question arises as to whether this is one contiguous project or several successive individual projects or if a Member State is permitted to stipulate procedural rules on this.[82] According to the ECJ, the conservation purpose of the Habitats Directive demands, on principle, that every intervention is assessed separately, especially when each measure already requires approval pursuant to national law.[83] This apparently applies even when a recurrent measure has finally been approved pursuant to national law before expiry of the deadline for implementation, as the requirement for a renewed appropriate assessment is not contravened by the principles of legal certainty and the protection of legitimate expectations.[84] However, the ECJ does recognise that recurrent maintenance measures can be regarded as a single project within the meaning of Article 6(3) HD if they can be viewed as a uniform measure based on their type or the circumstances of their implementation, especially as they always pursue the same aim (e.g. guaranteeing a specific depth of the shipping channel).[85] At the core of this lies a weighing up process between the protection of Natura 2000 sites from new interventions that is as comprehensive as possible and considerations on feasibility and legal protection, whereby, even in the case of a uniform project, Natura 2000 sites are constantly under the protection of the general prohibition of deterioration and disturbance in line with Article 6(2) HD.

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80 ECJ, adjudication of 14.1.2010 – C-226/08, margin number 35 *et sqq.*

81 ECJ, adjudication of 7.9.2004 – C-127/02 – Waddenvereniging and Vogelbeschermingsvereniging, margin number 21 *et sqq.*

82 *cf. Schoukens* JEEPL 2014, 1 *et sqq.*

83 ECJ, adjudication of 14.1.2010 – C-226/08 – Stadt Papenburg, margin number 37–41; adjudication of 7.9.2004 – C-127/02, margin number 28.

84 ECJ, adjudication of 14.1.2010 – C-226/08, margin number 41 *et sqq.*

85 ECJ, adjudication of 14.1.2010 – C-226/08, margin number 47–51.

Due to the impact-related understanding of the term, based on the dynamic development of the habitat types, species and habitat areas in the site concerned, new interventions must essentially be evaluated based on the situation in the site at the time of the planned measures, even if the type and extent of the interventions are similar.[86] In this process, the conservation status of the habitat types and species and their developmental trends can only be appropriately assessed at regular intervals over a few years due to the diversity of possible ecological changes (especially based on species dynamics and climate change) and the cumulative effects of additional proposed developments and impacts.[87] This means there is usually a change in the environmental situation after a year or more. This, alone, argues against the acceptance of an unlimited uniform project, even if the measures remain the same in type and scope.[88] Therefore, at minimum, recurrent measures need a screening process in order to check the status of the affected habitat types and species, to apply new scientific knowledge and to check on the environmental situation in the site as a whole, including cumulating projects and plans.

Rather more, the latitude granted by the ECJ in relation to consideration must be interpreted such that, procedurally, recurrent similar measures can only be summarised into one project within a limited time frame (e.g. 3-5 years) without notable losses in protection. In this process, the time frame is to be primarily determined based on the current conservation status of the affected habitat types and species and their assumed development and dynamics within the site. An approval of recurrent measures thus always requires time limitation.[89] If the type and scope of the measures change, then this constitutes a new project that must be assessed.[90] In contrast, if the recurrent measures are not subject to approval and also not part of a different approval (e.g. decision on planning approval for waterway construction), then each measure constitutes a project that must be assessed given the absence of the procedural structure inherent in an approval and the fact that no time limit can be imposed. This applies to many recurrent measures, in particular, most measures in agriculture, forestry and fisheries. At minimum, an obligation for disclosure to the responsible authorities is then required for these measures, whereby the introduction of a more comprehensive operating licence is probably associated with less administrative work for authorities and enterprises (see 6.1.4).

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86 *cf.* ECJ, adjudication of 14.1.2016 – C-399/14, margin number 58–62; adjudication of 7.9.2004 – C-127/02, margin number 21 *et sqq.*; BVerwG, decision of 12.3.2008 – 9 A 3.06, margin number 89.

87 *cf.* European Commission 2015; European Commission 2013; *Araujo et al.* Ecology Letters 2011, 484 *et sqq.*; *Uchida/Ushimaru* Biodiversity declines due to abandonment and intensification of agricultural lands: patterns and mechanisms 2014; *Wesche et al.* Biological Conservation 2012, 76 *et sqq*. For legal consequences for Natura 2000 and the appropriate assessment, *Möckel/Köck* JEEPL 2013, 54 *et sqq; Opdam/Broekmeyer/Kistenkas* EnvSci 2009, 912 (917).

88 *cf. Schoukens* JEEPL 2014, 1 (8 *et seq.*, 24 *et seq.*); *Albrecht/Gies* NuR 2014, 235 (241 *et seq.*). Other opinion *Würtenberger* NuR 2010, 316 (318); *Frenz* NVwZ 2011, 275 (277).

89 in contrast, the following only regard a time limit as potentially necessary: *Frenz* NVwZ 2011, 275 (277); *Albrecht/Gies* NuR 2014, 235 (242).

90 *Albrecht/Gies* NuR 2014, 235 (241).

6.2. Anticipated statutory exemptions for specific types of intervention

The ECJ has taken clear action against any attempts by Member States[91] to extend the scope of the term "project" and to thereby limit the applicability of the appropriate assessment through a statutory exemption for specific interventions and types of proposed development:

It is therefore clear from the case-law of the Court that, in principle, pursuant to Article 6(3) of the Habitats Directive, a Member State may not, on the basis of the sphere of activity concerned or by introducing a declaratory scheme, systematically and generally exempt certain categories of plans or projects from the obligation requiring an assessment to be undertaken of their implications for Natura 2000 sites.[92]

An exemption is only permissible in exceptional cases where the criteria for exemption can guarantee that the possibility of a significant adverse impact on the protected areas due to the projects concerned is ruled out.[93] The conditions that justify exemption must guarantee, both systematically and in each individual case, that the activities in question will cause no disturbance that might have a significant adverse impact on the conservation objectives.[94] In each individual case, therefore, there must also be certainty – i.e. without remaining scientific doubts – that no significant adverse effects are to be expected due to exemptions. A simple reference to the obligation to adhere to general conservation provisions is not sufficient if this will only reduce the threat of significant adverse impacts, but does not exclude them.[95] Likewise, spheres of action or installations cannot be sweepingly excluded, for example, due to their small scope or the low cost of proposed developments.[96] This also applies when these have previously already shaped the site, as is the case for agriculture, forestry and fishery or hunting,[97] or adherence to the conservation objectives has been contractually agreed.[98] The reason for this is that whether or not an activity or proposed development will have significant adverse effects is not only dependent on their nature and extent, but also on the sensitivity and the condition of the habitat types and species that are under protection in

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91 e.g. § 10(1) number 11 BNatSchG 2002.

92 ECJ, adjudication of 26.5.2011 – C-538/09, margin number 45.

93 ECJ, adjudication of 10.1.2006 – C-98/03, margin number 41; adjudication of 26.5.2011 – C-538/09, margin number 41 *et sqq. cf. Ureta* JEEPL 2007, 84 (90).

94 *cf.* ECJ, adjudication of 4.3.2010 – C-241/08, margin number 36.

95 ECJ, adjudication of 26.5.2011 – C-538/09, margin number 63. *cf.* adjudication of 4.3.2010 – C-241/08, margin number 39.

96 *cf.* ECJ, adjudication of 26.5.2011 – C-538/09, margin number 55 *et seq.*; adjudication of 21.9.1999 – C-392/96 margin number 66; adjudication of 10.1.2006 – C-98/03, margin number 43 *et seq.*, and adjudication of 4.3.2010 – C-241/08 margin number 31.

97 ECJ, adjudication of 4.3.2010 – C-241/08, margin number 39, 56.

98 ECJ, adjudication of 4.3.2010 – C-241/08, margin number 55.

the site in question, as well as on the previous pressures on the site and the additional cumulative effects of other projects and plans.[99]

Projects with a small scope or quantity can also have significant adverse effects on the environment if they are realised in locations where the environmental factors like fauna and flora, soil, water, climate or cultural heritage react sensitively to the tiniest of changes or other impacts exist or are to be expected.[100] Exemptions made in relation to the Natura 2000 appropriate assessment for projects and plans put forward by the administration, such as roads, railways, development plans or relating to the army[101], even projects proposed by the legislator[102], are also prohibited as there are no suitable institutional guarantees for sufficient protection. For this reason, plans and projects for site management that are issued with exemption in Article 6(3) HD must also be subject to strict requirements (see 4).

As a result, anticipated statutory exemptions must refer to the sensitivity and the condition of the affected habitat types and species to exclude significant effects with certainty in every case. General exemptions would therefore, at best, comply with these requirements within the designation act of a Natura 2000 site. Even here, compliance with the relevant provision in the designation act should be ensured through an anticipated Habitats Directive appropriate assessment.

Finally, the blanket exemption for certain activities also raises problems in relation to the principle of equality as other activities without exemption are subject to the conservation regime and must accept that the impacts of exempt activities will count against them as a previous pressure or cumulative pressure (e.g. when the high nitrogen pollution from agriculture poses an obstacle to a road construction project).

6.3. Individual questions relating to specific types of proposed development

6.3.1. Creation of sections for linear infrastructural developments

Longer linear infrastructures, such as motorways, railways and waterways or power lines are frequently divided into multiple sections, for which independent plans are then produced and authorisation procedures carried out. According to the BVerwG, such breaking into sections is also permissible in relation to the assessment of compatibility with Natura 2000 and the entire infrastructural development is thus not to be

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99 *cf.* ECJ, adjudication of 26.5.2011 – C-538/09, margin number 55 *et seq.*; adjudication of 21.9.1999 – C-392/96 margin number 66.

100 ECJ, adjudication of 26.5.2011 – C-538/09, margin number 55 *et seq.*; adjudication of 10.1.2006 – C-98/03, margin number 44; adjudication of 21.9.1999 – C-392/96 margin number 66. *cf. Ureta* JEEPL 2007, 84 (90).

101 BVerwG, adjudication of 10.4.2013 – 4 C 3.12, margin number 16 *et sqq.*

102 ECJ, adjudication of 16.2.2012 – C-182/10, margin number 69.

regarded and assessed as one project.[103] The ECJ also raises no objections to the creation of sections.[104] However, this does not mean that planning that is limited to one section is permitted to completely ignore and not overcome problems that are raised by subsequent sections.[105] A provisional positive overall verdict is required in relation to the subsequent sections, especially within the scope of a derogation assessment pursuant to Article 6(4) HD, to assess whether imperative reasons of overriding public interest justify a significant adverse impact.[106]

The BVerwG elaborates in settled case law on the required forecast projection, as follows:

The forecast must predict that the realisation of a proposed development will also not be impeded over its further course by any obstacles that cannot be overcome a priori. Whether or not the subsequent sections of the project can be realised is to be answered in court proceedings based on objective circumstances; what is decisive in this process is whether realisation can be excluded after a summary appraisal of the facts of the case. This forecast will not simply have a negative outcome because the proposed development - as is the case here - could or will probably have adverse impacts on an SCI over its further course; rather more, it must also be considered whether it appears possible to guarantee compatibility with the aid of conservation measures or to achieve permissibility of a proposed development based on a derogation assessment.[107]

Conversely, the legal validity of an approved section does not constitute an obligation to implement the subsequent sections in the sense that it is in the public interest to implement those sections and that this interest can no longer be overcome.[108] Although greater weighting is allocated to the planning of connection points (so-called constraint points) by the BVerwG, these do not create any strict connections in the sense that they must be set as fixed determinants in further planning.[109]

6.3.2. Air corridors

Based on the impact-related project term, the Federal Administrative Court (BVerwG) in Germany has recognised that the defining of air corridors constitutes a project within the meaning of Article 6(3) HD if this results in flights over protected areas at

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103 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 151; decision of 28.11.2013 – 9 B 14.13, margin number 13.

104 *cf.* ECJ, adjudication of 24.11.2016 – C-461/14, margin number 14, 24, 29.

105 BVerwG, decision of 28.11.2013 – 9 B 14.13, margin number 13.

106 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 151; decision of 28.11.2013 – 9 B 14.13, margin number 13. For details on this, also *Möckel* Nature Conservation 2017a.

107 BVerwG, decision of 28.11.2013 – 9 B 14.13, margin number 13. Similar to, e.g. BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 151; adjudication of 12.3.2008 – 9 A 3.06, margin number 270 *et seq.*

108 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 82 with further references.

109 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 82.

a certain regularity and intensity.[110] Even the fact that deviations from the defining of flight procedures are permitted in individual cases under German law changes nothing in relation to this. According to the BVerwG, deviations from the defined air corridors requiring approval (e.g. lower flight altitudes) also constitute projects, even if these are associated with the German armed forces and thus serve the purpose of protecting public safety.[111]

6.3.3. Maintenance measures

Maintenance measures entail managing and maintaining objects, including linear structures like roads, railways, waterways, long distance pipelines, supply and sewage pipelines or drainage ditches, and spatially limited facilities like harbours, airports, residential areas or industrial plants. However, in the European cultural landscape, these are also carried out on natural water bodies and near-natural landscape elements (e.g. hedges, parks). Maintenance measures denote that these are intended to reinstate the earlier status quo at regular intervals or as required and to remove natural or anthropogenic changes that have occurred in the interim (e.g. removal of plant growth in drainage ditches, removal of dead wood from water bodies, keeping road and railway margins and power lines clear). These act on a regular basis to combat natural development. Adverse effects on the conservation objectives can therefore not be excluded if these measures are carried out within or in the vicinity of Natura 2000 sites, such that this constitutes a project and, at minimum, screening should be conducted.[112] The question discussed in 6.1.5 arises, as to whether and to what extent maintenance measures that are temporally separated are to be treated as a project, as these are recurrent measures. This must also be answered for maintenance measures in relation to the fact that measures that are subject to approval can generally be summarised into one project within a limited time span, while measures that are not subject to approval are to be assessed individually and accordingly in line with Article 6(3) HD.

Pursuant to Article 6(3) HD, those measures that are immediately associated with the management of a Natura 2000 site or are required for this purpose do not constitute maintenance measures that are obliged to undergo an assessment. This refers to the conservation, management and developmental measures for the maintenance of the relevant protected habitat types and species as these have no impact on the conservation objectives, but are designed to promote them (see 4).

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110 BVerwG, adjudication of 19.12.2013 – 4 C 14.12, margin number 28; adjudication of 12.11.2014 – 4 C 34.13, margin number 29.

111 BVerwG, adjudication of 10.4.2013 – 4 C 3.12, margin number 30.

112 ECJ, adjudication of 14.1.2010 – C-226/08, margin number 41–50; adjudication of 13.12.2007 – C-418/04, margin number 256 *et seq.*; BVerwG, adjudication of 12.3.2008 – 9 A 3.06, margin number 97 *et sqq.*

6.3.4. Land use practices related to agriculture, forestry and fisheries

Agriculture and forestry not only constitute the largest uses of areas within and outside Natura 2000 sites, they are also among the factors that pose the greatest threat to habitats and species in the EU (see 2).[113] The reasons for this are manifold. The main causes are the morphological and hydrological re-organisation of areas, including the transformation of permanent grassland into arable land, the intensity of land use and the application of fertilisers and plant protection products. However, the cessation of land use practices in the case of historically cultivated areas (e.g. meadows with scattered fruit trees, alkaline grassland) also causes losses of habitats and species worthy of conservation. Agriculture, in particular, has a substantial influence on Natura 2000 sites, namely, also from outside their boundaries.[114] It is questionable to what extent land use practices related to agriculture, forestry and fisheries meet the definition of the term "project" and are subject to appropriate assessments. The German Federal legislator had attempted up to 2007 to expressly exclude such land use from appropriate assessments. This was regarded as in contravention of Article 6(3) HD in ECJ infringement proceedings.[115] Following this, an obligation for disclosure was introduced for all projects that had previously not required approval, whereby the assumption is established in the justification for the change in law that, as a rule, correct land use practices related to agriculture, forestry and fisheries do not constitute a project.[116] Under reference to this justification, the BVerwG concluded in a decision that, as a rule, agricultural land use is not to be regarded as a project as correct agricultural land use does not constitute an intervention into nature and the landscape under other national legislation pursuant to § 14(2) of the Federal Nature Conservation Act (BNatSchG), if the requirement for best practice is adhered to and the conservation objectives are considered.[117] In the Court's opinion, the protection of Natura 2000 sites from agricultural impacts is governed solely by Article 6(2) HD. According to this, it is the obligation of the legislator responsible for the protection of a Natura 2000 site to lay down rules through the designation of a protected area and its management to prevent any changes or disturbances arising from a specific agricultural land use that could lead to a significant adverse effect on the site in relation to its components that are essential to the conservation objectives or conservation purpose.[118]

This decision is surprising as, on the one hand, in the particular case in question - which is by no means an isolated legal case - the implementation of another project (a section of the A33 motorway) was being debated as the critical load in the site

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113 EEA 2015, p. 6 *et seq.*, 151 *et sqq.*

114 European Commission 2015, p. 12 *et sqq.*; EEA 2015, p. 6 *et seq.*, 151 *et sqq.*

115 ECJ, adjudication of 10.1.2006 – C-98/03, margin number 39–45.

116 Bundestag-Drucksache 16/6780, p. 13; Bundestag-Drucksache 16/12274, p. 65.

117 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 89.

118 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 89.

had already been exceeded by agricultural nitrogen pollution from outside the site.[119] Construction of the section of the motorway was only admissible within the scope of a derogation procedure through measures to reduce the agricultural nitrogen pollution (including the transformation of arable land into a forested area), which the BVerwG classified as compensatory measures for the overall coherence of Natura 2000 within the meaning of Article 6(4) HD.[120]

On the other hand, the Court's interpretation is not compatible with the impact-related understanding of the term and ECJ case law. Given the significant impacts of measures employed in land use practices related to agriculture, forestry and fisheries on the environment and nature (especially through nitrogen pollution, the use of pesticides and changes to soil structure and the water balance), significant adverse effects on the conservation objectives of Natura 2000 sites - either individually or cumulatively - cannot generally be excluded if these occur within or in the vicinity of Natura 2000 sites. The ECJ[121], but also, for example, the overwhelming opinion in the German literature[122], therefore classifies measures associated with land use practices related to agriculture, forestry and fisheries as projects within the meaning of Article 6(3) HD, for which at least a screening process is required. This also applies to the resumption of land use practices that were stopped or have been intensified.

The blanket special treatment of land use practices related to agriculture, forestry and fisheries that is favoured by the BVerwG essentially constitutes an anticipated legal exemption for specific types of projects for which the ECJ has set up strict requirements to prevent the circumvention of the protective system outlined in Article 6 HD (see 6.2). Based on this, even uses such as agriculture, forestry and fishery or hunting that shape the site may not be issued with a blanket exemption from the protective system and the appropriate assessment, so long as the possibility of a significant adverse effect on the protected areas by these debatable projects cannot be systematically excluded with certainty in each individual case, as well as without any remaining scientific doubt.[123]

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119 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 62 *et sqq.*

120 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 84 *et sqq.*

121 on land-use measures that shape sites, such as hunting: ECJ, adjudication of 4.3.2010 – C-241/08, margin number 39, 56; on mechanical shell fishing: ECJ, adjudication of 7.9.2004 – C-127/02, margin number 27; on the intensification of land use, drainage and the consolidation of agricultural land ECJ, adjudication of 25.11.1999 – C-96/98, margin number 29, 45 *et seq.*; on irrigation ECJ, adjudication of 18.12.2007 – C-186/06, margin number 26 *et sqq.* and on overgrazing ECJ, adjudication of 13.6.2002 – C-117/00, margin number 22-33.

122 e.g. *Gellermann*, in: Landmann/Rohmer, Umweltrecht, 2016, § 34 BNatSchG margin number 7; *Ewer*, in: Lütkes/Ewer, § 34 margin number 4; *Mühlbauer*, in: Lorz et al., Naturschutzrecht, 2013, § 34 BNatSchG margin number 3; *Wolff*, in: Schlacke, GK-BNatSchG, 2012, 1. ed., § 34 margin number 3; *Klinck* 2012, p. 107; *Möckel* NuR 2012, 225 *et sqq.*; *Meßerschmidt* 2011, p. 679; *Czybulka* EurUP 2008, 20 (21 *et seq.*).

123 ECJ, adjudication of 4.3.2010 – C-241/08, margin number 39, 55 *et seq.*

However, general nationwide provisions on correct land use practices related to agriculture, forestry and fisheries cannot safeguard this as they are neither tailored towards the protection of species or habitat types in particular need of protection, nor do they contain specific demands for protection for the Natura 2000 sites that are affected.[124] The demand by the ECJ[125] for appropriate assessments in individual cases also applies for agriculture, forestry and fisheries. Anticipated general exemption for these land uses is only possible in the designation act, with corresponding site-specific definitions of requirements for land use practices and measures laid down in the management plan.[126] However, for reasons of proportionality, it is viewed as permissible that multiple land use measures that are based on each other or are recurrent within an adequate time frame of approx. 3–5 years can be handled as a cohesive project (see 6.1.5).

7. Conclusions

In summary, it must be noted that the term "plan" and, to an even greater extent, the term "project" in Article 6(3) HD are the decisive keys to the initiation of an appropriate assessment and to its requirement. In this process, the ECJ allocates the decisive importance to the term "project". Under reference to the term "project" in Article 1(2) a) of the EIA Directive 2011/92/EU, the term in Article 6(3) HD includes not only building installations, but also all human interventions in nature and the landscape, independent of whether they are also subject to an authorisation procedure based on national law. The impact-related understanding of the term "project" means that the screening of the potential impacts is included. Here, direct impacts and also indirect impacts, which might be attributed, are relevant and interactions with other plans and projects must be considered. From this, it follows that activities which are typically not subject to approval, such as land use practices related to agriculture, forestry and fisheries or maintenance measures, may also constitute projects and hence their appropriate assessment may be required, unless significant adverse effects on the integrity of a Natura 2000 site cannot be clearly excluded, either individually or cumulatively. Statutory rules of procedure (e.g. obligations for disclosure) are therefore required to ensure that an official screening process, followed by a main assessment, if necessary, can be carried out for these land use practices and their management measures. Based on the impact-related understanding of the term, the ECJ also places high demands on anticipated general exemptions for specific project types and plans. There is thus no possibility for statutory national exemption (e.g. for agriculture, forestry and fisheries). Anticipated exemptions require a specific provision in, for example, the designation act of a Natura 2000 site or in the management plan.

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124 due to the current lack of demanding provisions for agriculture land use in EU *cf. Möckel* Land Use Policy 2015, 342 *et sqq*.

125 ECJ, adjudication of 20.10.2005 – C-6/04, margin number 47.

126 *cf.* European Commission 2000, p. 31. How to set site-specific conservation objectives for farmland areas in Natura 2000, described in European Commission 2014, p. 33 *et sqq*.

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